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EFFECT OF A BANKRUPT'S CERTIFICATE UPON THE CLAIMS OF SURETIES.

WELLS *v.* MACE, 17 Verm. 503.

A DECISION recently made in the state of Vermont, (*Wells* v. *Mace*,) has given rise to a large amount of litigation in various parts of the country, upon a question which has seemed scarcely open to doubt. The court, in that case, held that, under the late bankrupt law of the United States, (the act of August 19, 1841,) a certificate of discharge does not protect the bankrupt against the claim of his surety to recover money paid by him after the granting of the certificate, upon a debt which had become due before the date of the certificate. In states where the decisions of that court do not prevail as authoritative precedents, it becomes important to inquire into the soundness of the construction thus unexpectedly applied to the statute.

The weight of the decision, as authority, might have been greater, if the court had exhibited a less superficial view of the question in its reasoned judgment, or had not fallen into such manifest confusion of legal ideas as to determine that an obligation merely moral is sufficient, not only to support an express promise to pay, but even to raise an implied request, upon

which to found an implied promise which is legally binding. Thus an obligation first assumed to be invalid in law, is held, by its own force alone, to imply an obligation which is legally valid and binding. Such a fallacy, lying at the basis of the court's judgment, admonishes us to examine the grave question passed upon in the case, without too much deference for the authority of this decision.

Our American systems of bankruptcy, both that of 1800 and that of 1841, were derived from the long established system of England. Both the American acts were so framed as to embrace the improvements which had been engrafted in England upon the original system, up to the time of their adoption respectively. From the 34 Henry VIII. to the latest English statute on the subject, the law of bankruptcy has been frequently modified, with the uniform purpose of extending the relief of creditors under the commission, and of bankrupts under the certificate. At first the commission of bankruptcy was in the nature of a criminal proceeding, having no view to the bankrupt's discharge from his debts. At a still later period, when the principle had been recognized that "the privilege of creditors to come in and prove their debts, and bankrupts to be discharged therefrom, is coextensive," (Bac. Ab. Bankrupt, E.) contingent claims, debts payable *in futuro*, &c., were excluded from the proof and the discharge. By 7 Geo. I. c. 31, debts payable at a future day were declared to be provable and to be discharged by the certificate. Prior to Sir Samuel Romilly's act (49 Geo. III. c. 121,) it had been established that a surety of a bankrupt could prove his claim, if he had paid the debt before the bankruptcy or commission, and, in such case, the surety's claim was discharged, whether proved or not; and that act was passed to enable sureties to prove their claims under the commission for money paid after the commission; and it enacted that the bankrupt should be discharged of all demands of a surety "thereby enabled to prove." (See the act, 12 East, 666.) The latter clause is not expressly adopted in the 6 Geo. IV. c. 16, which reduced the previous statutes into one. But § 121 of that act provided that the bankrupt should be discharged from "all debts due by him when he became bankrupt, and from all claims and demands hereby made provable under the commission."

And by § 52 a surety or other person liable for a debt of the bankrupt, &c. was enabled to prove under the commission in respect of any payment made by him, although made after the commission issued. Other sections (§ 51, 53, 54 and 56) permitted the obligees in bottomry and respondentia bonds, the assured in policies of insurance, annuitants, and holders of debts payable on a contingency which has not happened, or at a future day, to prove their claims. Those sections also provided that, after proof of bottomry and respondentia bonds and policies, the holders should receive dividends when the loss or contingency should have happened; but that "debts" payable *in futuro*, or on a contingency, and annuities should be valued and the present value allowed. This process of valuation had been applied to debts payable *in futuro* by 7 Geo. I. c. 31, and to annuities by the courts, previous to 49 Geo. III. c. 121, where the annuity had been secured by a bond which had been forfeited before the bankruptcy. By the latter act (§ 17) it was applied to all annuities.

It may here be observed that the provision for valuing contingent debts gave rise to a rule that no debts of that kind could be proved, unless the contingency was of such a nature as to be capable of valuation; and the application of this rule has been the occasion of much subtlety of distinction and much litigation. It lies at the foundation also of some cases which, if this circumstance be not attended to, may seem, by analogy, to favor the idea that the claims of sureties are not barred under the English statutes. See *Lane* v. *Burghart*, (3 Man. & Gran. 597,) and cases there cited; Pitman on Prin. & Sur. 103.

The American bankrupt law of 1800 preceded Sir Samuel Romilly's act, and did not, like that statute, provide for the proof of the claims of sureties under the commission. It allowed the proof only of ordinary debts absolutely due, and (§ 39) debts due at a future day, bottomry and respondentia bonds and policies of insurance. As in making this enumeration the claims of sureties were omitted, and as "debts provable under the commission, and debts to be discharged by the certificate were convertible terms," (6 John. Ch. R. 286,) it was very clear that the bankrupt under that act was not protected from the claim of his surety paying money after the

granting of the certificate, or even after the bankruptcy. Ib. and see 4 Mass. 96.

But, before the passage of our act of 1841, not only Sir S. Romilly's act, but all the improvements contained in the statute 6 George IV. c. 16, had been devised and adopted in England, and congress then preserving the ancient principle, that "all debts, contracts, and other engagements of the bankrupt which are provable," should be discharged (§ 4), proceeded to embody in a single brief clause all the demands which should be provable. "All creditors," says the act, in § 5, "whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly as debts *in presenti*."

Thus every claim was made provable which had ever been made provable in England; sureties were permitted moreover to prove without paying the debt of the principal; and the embarrassing questions as to the valuation of contingent demands were wholly avoided by placing those demands, as far as dividends are concerned, on the footing which had been long occupied by policies of insurance and bottomry and respondentia bonds in England. They were to be allowed when the contingency should have happened. The same rule was applied to the demands or claims of sureties, because they were expected to prove before they had paid anything, or, in other words, before their claims had become "absolute." In relation to sureties, the design of the legislature evidently was to adopt the provisions of the English statutes and to extend and simplify their operation, by omitting the requirement that sureties should pay the debts of their principal before making proof; and no further modification of those statutes seems to have been intended.

It was well observed by counsel, in *Jackson* v. *Magee*, that the history of the law on the subject of sureties for bankrupts

exhibits a constant struggle to evade the intention of the legislature, that the bankrupt should become a *new man* by the certificate. But as often as the certificate has been interposed, it has been held a valid defence against the claims of sureties, if they were such as could have been proved under the commission by virtue of the English statutes. Pitman on Prin. & Sur. 137, &c.; Theob. on Prin. & Sur. 234, &c.; Smith's Mer. Law, 408, 484; *Westcott* v. *Hodges*, (5 B. & Ald. 12.)

In *Haigh* v. *Jackson*, (3 Mees. & W. 598) the defendant, having a sum of money owing to him by a third person, the plaintiff, at the defendant's request, and for his accommodation, drew a bill on that person for the amount, which the latter accepted; the plaintiff indorsed the bill and handed it over to the defendant, who also indorsed and negotiated it. Before it became due, the defendant had become bankrupt, and the bill, being dishonored, was taken up by the plaintiff. The action was brought to recover the money paid, and the court held that the bankrupt's certificate was a good defence, because "the plaintiff was surety for the bankrupt." In *Jackson* v. *Magee*, (3 Ad. & El. N. S. 48,) the attempt was made to avoid the effect of a plea of a certificate, by replying, that *before* the plaintiff, a surety, had paid the money for which he sued, the defendant, his principal, had obtained his certificate and a *final dividend* had been made of his estate, and that there was not any doubt in respect of the payment of which the plaintiff could have proved or for which he could have received any dividend. But Lord Denman, C. J., delivering the judgment of the court, said, "we are clearly of opinion that the defendant is entitled to our judgment in his favor. The debt was due before the bankruptcy; the creditor might have proved it under the fiat; and if he had, the plaintiff could have been entitled to the benefit of that proof and of any dividends which might be paid by the estate, either in reduction of the sum for which he was liable to the creditor, if that creditor received the dividends, or by receiving the dividends himself, if he paid the whole debt to the creditor. Or, the plaintiff might have paid the debt at once to the creditor, and have himself proved under the fiat, long before any dividend was declared. Or, if the creditor would not take the money, the plaintiff might have compelled him to prove for his, the plaintiff's, benefit, &c. The plaintiff

cannot be allowed, by voluntarily delaying the payment of the debt till after a final dividend had been made, to deprive the defendant of the benefit of his certificate."

This case, and *Haigh* v. *Jackson*, which both arose under the statute 6 George IV., illustrate the course of decisions in England on this subject. And it would seem that they are equally applicable to our own recent act. It contains no regulation for a "final" dividend, as did the American act of 1800 and the English statutes. It assigns no limit to the time for proving claims. A surety, even after the certificate, might pay off the debt, and then prove under the commission, if a previous payment were necessary. Should he, by any delay, be permitted "to deprive the bankrupt of the benefit of his certificate?" especially when he can prove without paying the debt, which he could not have done in England.

Under our act of 1800, as well as under the older English statutes, it was held, that where the surety had taken from the principal a bond for his indemnity, the claim of the surety became barred, although he might have paid the debt after the certificate was granted. The reason was, that the bond enabled the surety to prove under the commission and receive dividends in respect of such payments as he should afterwards make. *Roosevelt* v. *Mark*, (6 John. Ch. R. 266.) In that case, the court proceeded on the ground, that when circumstances (without an express provision of law,) enabled the surety to prove under the commission, his claim was discharged by the certificate; because these terms were "convertible." Certainly it must follow, when the law itself makes all "claims" of sureties provable, without exception, that all "contracts and other engagements of the bankrupt" with his surety, express or implied, are discharged.

The language of our recent act, that all contracts and engagements, as well as debts, which are provable, shall be discharged, is peculiarly comprehensive. Other parts of the statute also regulate the mode of proving "debts and other claims," (§ 6), and the fees to be paid on making proof of "any debt or other claim of any creditor or other person," (§ 13.) Yet there is not a word in the act to declare what debts, contracts or engagements, or what claims of creditors or other persons are "provable under this act," except the clause

above cited in relation to sureties, &c. Now if this clause and the claims of sureties and others therein enumerated are referred to as provable in § 4, then they are all expressly discharged; if they are not the debts, contracts and engagements there referred to, the law has wholly failed to declare upon what the certificate shall operate as a discharge. It would follow also, that debts payable *in futuro*, annuities, policies, and bottomry and respondentia bonds, are not discharged by the certificate; for, according to ancient rules of construction, they are neither provable nor discharged unless by virtue of explicit enactment, and in this law they must stand or fall with sureties, indorsers, bail and all others having uncertain or contingent demands. If none of these were to be discharged, except when they had been actually proved under the commission, our legislature, without intimating such a design, swept away the improvements of a century, and substituted obsolete inconveniences of the old bankruptcy system.

The Vermont court, in *Wells* v. *Mace*, suggests that "the intention was to enlarge the remedy of a surety or bail, and not to restrain it." Certainly; and the remedy of claimants and the discharge of the bankrupt, being coextensive (Eden on Bank. 413) to enlarge the remedy of the surety was equally to extend the discharge of the bankrupt. The court, however, deduced an opposite conclusion, and thought it the more obvious from the farther provision of the same section, (§ 5) which is this: "And no creditor or other person, coming in and proving his debt, or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt." A similar provision is found in the English act, 6 Geo. IV. c. 16, § 59, (Smith's Merc. Law, 403,) though not precisely the same. It is intended to stay proceedings against the bankrupt, before the certificate is granted, and therefore very properly extends only to those who have elected to prove under the commission. It makes no allusion to the effect of the certificate after it is granted. If it followed from this, (as a "correlative," according to the idea of the court,) that a surety who had not proved, retained his right of action unimpaired by the certificate, every creditor may retain his right in the same way; for the language is explicit, "no *creditor*

or other person coming in," &c. So that the intention of the legislature to discharge all debts and claims, made *provable*, would be frustrated, and none would be barred unless *proved*. It might perhaps be more plausibly argued, that since the act, in this place, declares what shall be the effect of making proof, and does not say that it shall *discharge* the debt, the fact of proving or omitting to prove, was not designed to affect the question of discharge. Besides, if, as the court seems to suppose, this clause relates to the discharge of a surety's claim upon his proving it, then it becomes barred, if proved, although a certificate may never be granted. But arguments drawn from the the context cannot have much weight in the construction of the act in question, for it is a hotch-pot throughout. Its provisions are so ill arranged that the maxim, *noscitur a sociis*, does not apply to them. Such an argument however appears unnecessary. The law is plain. It declares that all debts, contracts and other engagements which are provable, shall be barred by the certificate; elsewhere it enacts that the contracts and engagements of a bankrupt with his sureties, without exception, shall be provable; the consequence follows, as a demonstrated proposition, that all claims of sureties are discharged, whether they have been proved or not. This is in accordance with English authority, with the analogy of a former American decision, and with the intent of the legislature, as it may be inferred from the history of the system of bankruptcy. So plain a purpose is not to be defeated by the accidental circumstance that the clause, permitting sureties and others to prove, was placed in the midst of a string of provisions such as those in the fifth section. And since the court which decided *Wells* v. *Mace* advanced no sounder reasons than those adverted to, for setting aside the plain language of the statute, it is not to be expected that their decision will be followed. It is rather to be supposed that other courts will adopt the language of Kent, C., in relation to the old American law, that "the bankrupt act of the United States was a consolidation of the previous provisions in the English statutes of bankruptcy, and the English decisions on their statutes, prior to that date, properly apply as rules of construction to this act of congress." (6 John. Ch. R. 285.) In examining those decisions it will be found that they have disposed of every plausible argument which can be now urged

in favor of the rule adopted by the Vermont court, and have fortified the opposite doctrine by cogent reasons which are as applicable to our statute as to the English. In applying those decisions it is only necessary to remember that, under our act, the discharge of the bankrupt is more complete and extensive, perhaps, because it expressly provides for the proof of the claims of his sureties while they remain "contingent;" and that he may be also discharged from the claims of co-sureties and others, whose demands are not barred in England, because they depend on contingencies incapable of valuation. R.

Recent American Decisions.

Supreme Court of Vermont, Windham County, February, 1848.

WILLIAM C. WELLS *v.* AURELIUS C. HOWARD.

Where, upon the purchase of land, two promissory notes were given, and at the same time the payee of the notes, who was the owner of the land, executed a bond to the makers of the notes conditioned to convey the land to them in one year, if the notes were first paid and a house erected upon the premises, and when the land in question was the day after the date of the notes conveyed by mistake to a third person, but had, before the commencement of the suit, been reconveyed to the original owner, in a suit upon the notes, it was *held*, that the conveyance of the land was no bar to the action.

The *partial failure* of the consideration of a note is not a sufficient defence.

The doctrine of dependent and independent covenants discussed.

THIS was an action upon two promissory notes, made payable to one Samuel Dexter, or order, and indorsed to this plaintiff, for the purpose of collection merely, dated September 2, 1836, the first payable on the 1st of April, 1837, and the other in one year. These notes were given by defendant and one Lovell upon the occasion of a contract for the purchase of a piece of land, in the state of Michigan, of Dexter, and at the same time, Dexter executed a bond to them, by which he covenanted to convey the land to them in one year, upon condition, that they first paid the notes according to their tenor, and also erected a dwelling-house, of certain specified dimen-

sions, upon the premises, within the year. By agreement of parties, the case was tried by the court in the court below, on the general issue, as well as upon certain pleadings, ending in demurrer, which will appear in the opinion of the court. On the trial upon the general issue it appeared, that on the 3d day of September, 1836, Dexter conveyed the land to one Hutchins, and after several mesne conveyances the same was reconveyed to Dexter, on the 6th August, 1838, and long before the commencement of this suit. Upon these facts, the court held the plaintiff could not recover upon the general issue, and also decided that defendant's rejoinder was sufficient. The case came into this court upon exceptions taken at the trial by the plaintiff.

The opinion of this court was delivered by

REDFIELD, J. The pleadings in this case certainly do not amount to any defence to the action, even on the most favorable view of the case for the defendant. The plea in substance alleges, that the consideration of the notes was the bond executed by Dexter, and that by the conveyance of the land by Dexter the defendants were hindered from performing their contract to build the dwelling upon the land, and so the consideration of the notes has wholly failed. This is a strange *non sequitur*. The view now presented in argument, on the part of the defendant, is, that the consideration of the notes being the *performance* of the contract on the part of Dexter, that his having disabled himself from that performance, works such a failure of the consideration of the notes, as will exonerate defendant. But the plea presented no such question. The plea in express terms alleges, that the notes were executed "in consideration of a certain bond, or writing obligatory, made and executed by said Samuel Dexter, in the penal sum of $1500, and delivered to defendant," and it alleges no other consideration for the notes whatever. We shall soon see, that in the judgment of this court, the construction put upon the contracts by the defendant's counsel, at this early stage in the controversy, was the true construction. But the replication, to avoid perhaps the imputation of bad faith on the part of Dexter, sets forth that the conveyance was by accident, and a reconveyance was obtained before any injury accrued to de-

fendant. The rejoinder then sets forth, that the said Dexter was without title to the land from the time he conveyed till he obtained a reconveyance, which would seem to be rather a natural sequence of the facts already alleged in the plea, and admitted in the replication. If it is anything more, it is a bold departure from the plea, and so bad upon that ground. In substance and effect it seems to me to be a mere repetition of facts already admitted upon the record, but more distinctly in the replication than in the plea, and in form certainly it does not support the plea, but is an attempt to shift the point of the defence from the hindrance of the defendant in erecting the dwelling-house, to the inability of Dexter to perform his portion of the contract, which is an entire departure, and so bad.

But the whole case comes up upon the general issue. And it has been examined at great length, and with creditable research, and the points presented with uncommon force and ingenuity upon both sides, and the court have not been entirely without difficulty, or doubt in regard to the case. It does not seem to me that the cases, either English or American, are very explicit, in regard to the true criterion, by which to distinguish between dependent and independent stipulations; or that they are wholly consistent with each other.

I do not well comprehend how there need be any difficulty in determining cases of this character, if we can come at the true intent of the parties. It is of course, in the very outset, indispensable to determine whether the stipulations are dependent, concurrent, or wholly independent.

Dependent covenants, or promises, are where the obligation on the one part is made to depend upon the fulfilment of the stipulations on the other part, so that no obligation attaches on the one side, until the other side has performed. Performance on one side is a condition precedent to any obligation whatever on the other side. In such a case the promise or covenant on one side is the consideration for the performance on the other; but on the other, the stipulation is in some sense the consideration for the corresponding stipulation of the other party, but at the same time a further condition is superadded, that the obligation to perform shall not accrue upon one side, until there has been full performance upon the other. This in terms is the present case. The defendants, in consideration of the obliga-

tion of Dexter, promised absolutely to pay these notes before they had any claim whatever upon him. And in addition to this they consent to accept Dexter's obligation, with a still further condition, that they should erect the dwelling named above before any right of action on their part accrued against Dexter. This condition in the bond seems to have been wholly independent of the notes. It does not appear that Dexter had any security, or contract for the erection of this dwelling, except that the defendants must do it in order to entitle themselves to redress upon the bond. If the defendants, after paying the notes, which they were to do at all events, chose not to erect the building, they lost what they had paid, but Dexter could not compel them to erect the dwelling, and then take the land. So too if they paid the money according to their promises, and were hindered in erecting the dwelling by Dexter they would be excused from the performance of that condition. For it is settled that the performance of a condition precedent even, will be excused when hindered by the act of the other party. And that is the only connection the erection of that building has with the notes; and this is all the effect the hindering defendants from erecting it will have upon the contract, unless we superadd to the bond convenants and conditions, which it does not now contain. This view of the subject seems pretty much to dispose of the present case. It is dependent on one side, and independent on the other. But unfortunately for the defence, the payment of the notes is an independent undertaking, and unless we can superadd stipulations not even hinted at in the contract of the parties, we do not well see how a court of law can afford any relief in the present case. Possibly a court of equity might interfere, if the facts show mistake, or irreparable injury, or that Dexter's deeding the land misled the defendants into the belief that Dexter intended to abandon the contract.

But to put this case in another light. I cannot myself perceive how the reasoning upon the subject of dependent and independent covenants has any application to it, or indeed to any sealed instrument, unless so expressed in the deed, or unless the conduct of the parties amounts to a rescinding of the entire contract, which seems to be a somewhat distinct view, although intimately connected. The subject of the failure of

the consideration of defendants' contract hardly arises here. The consideration of these notes is Dexter's bond. It can be nothing else, unless it be that it is nothing, and the notes were given without consideration. For it is in vain to argue that performance on the part of Dexter was the consideration of these notes, when one of the notes was to be paid long before any one contemplated any act to be done on the part of Dexter. And even if it could be argued, that performance on the part of Dexter constituted a portion of the consideration of the notes, it will not help the defendant, for a partial failure of the consideration of a promissory note is not a sufficient defence. All that can be said here is, that the parties have seen fit to make the obligation of payment on the part of defendant a condition precedent to any obligation whatever on the part of Dexter, and he must perform it, unless by Dexter's conduct he has been released. This seems to us the only view of the case upon which the defendant could hope to prevail. The act of Dexter in conveying away the land, seems to me to have no connection whatever with the consideration of the notes, or with any act of either party, contemplated at the time of entering into the contract. It is true it might hinder the defendant and Lovell from erecting the dwelling, and so excuse that act, or it might hinder Dexter from conveying the premises to defendant at all; but *non constat* that the defendant and Lovell will ever perform on their part, and until they do, or are in readiness to do so, there seems to be no obligation upon Dexter to be in readiness to perform on his part. Certainly no such obligation is imposed by the contract, and it is not for the court to ingraft implied covenants upon the shoulders of express covenants, and in regard to the same subject-matter.

But I readily perceive, that conveying away the title to the land may, under some circumstances, constitute a defence to those notes, either in law or equity, or it might be no defence at all. If done by accident, or mistake merely, which would make the grantee but a trustee, or if done expressly in trust, it would amount to no defence, either in law or equity. If done absolutely and knowingly, it would undoubtedly be such an abandonment of the contract as would justify the other party in treating the contract as rescinded, if he chose to do so. But nothing of this appears. If known to defendant, which does

not appear in the present case, and he had been thereby induced to omit performance on his part, it might be a good ground of relief, even although the conveyance were in fact a mere trust.

Hence it appears that the facts in this case afford no ground of defence, and the cause is remanded for further trial upon the general issue, if desired by defendant.

Windsor County Supreme Court, Vermont, March, 1848.

HOPKINS *v.* ADAMS & ARMINGTON.

Where a bill in equity was brought to obtain relief in regard to a negotiable promissory note, lost when over due, and not indorsed, and where an affidavit of the loss was annexed to the bill, but no indemnity tendered, either before or after process, to the defendant, and where the claim was barred by the statute of limitations, it was *held*, that the bill could be sustained, as there was no necessity of any indemnity. Whether the bill could not be as well sustained, though the claim were not barred by the statute of limitations. *Quære?*

Where the account given by the orator in a bill of equity of the loss of a note, is somewhat unsatisfactory, and where, at the same time, the defandants do not, in the first instance, move for an indemnity, and deposit the money subject to the order of the court, a court of equity will give costs to neither party.

Cases considered in which a court of equity will interfere in regard to lost instruments.

THE facts of the case are sufficiently stated in the opinion of the court, by

REDFIELD, J. This is a bill to obtain relief as well as discovery, in regard to a negotiable promissory note, alleged to have been lost when over due, and not indorsed, annexing to the bill an affidavit of loss, but no indemnity being tendered the defendants, either before or at the time of bringing the bill, the plaintiff insisting all along that none is necessary, though he offered a release of the note. The defendants have answered the bill, testimony has been taken, the case has been heard in the court of chancery, and a decree entered for the orator requiring him to give an indemnity, and to pay defendants' costs. The case has been argued in this court mainly, on the part of defendants, upon the ground, that the jurisdiction of the court of chancery, in cases like the present, depends exclusively upon the offer in the bill of an indemnity to defendants, and that while the orator resists this, he is not entitled to a decree.

Mr. Justice Story (1 Eq. Jur. p. 103,) seems to lay down the rule in the very terms contended for by the defendants' counsel. "In such a case, (that of a lost instrument) a court of equity will entertain a bill for relief and payment, upon an offer in the bill to give a proper indemnity, under the direction of the court, *and not without.*" And he further says, that "such an offer founds a just jurisdiction;" citing for the two last propositions, *Walmsley* v. *Child*, (1 Ves. 344, 345); *Teresey* v. *Gorey*, (Finch's R. 301.) Story also cites *Glynn* v. *Bank of England*, (2 Ves. 38); *Mossop* v. *Eadon*, (16 Ves. 430, 434); *Bromley* v. *Holland*, (16 Ves. 19—21); *Davies* v. *Dodd*, (4 Price, 176.) Upon the slightest examination of these cases, it is apparent that they establish no such proposition as that cited from the text. All, except the first, seem to have no bearing whatever upon the point. *Teresey* v. *Gorey*, as reported by Lord Hardwicke in *Walmsley* v. *Child*, is only the case of a bill of exchange properly negotiated, and where, by the custom of merchants, no holder is entitled to require payment until he surrenders the bill; and if it be lost, he cannot do this, and of course can maintain no action whatever at law. So that the only remedy in such case is in equity, and an indemnity should, no doubt, be required in all cases of that character. This is precisely the rule laid down in *Hansard* v. *Robinson*, (7 Barn. & C. 901); (14 Eng. C. L. R. 20,) where it was held, that upon such a bill, no action at law could be maintained, although the bill was lost when over due. The same rule has been adopted in this state. *Layell* v. *Layell*, (12 Ver. R. 443.) In *Glynn* v. *The Bank of England*, Lord Hardwicke does make an incidental remark to the effect, that one is not ordinarily entitled to come into a court of equity for *relief* on a *lost note*, but that he may come for a *discovery*, and then must seek his relief at law. But the case is decided altogether upon the ground of defect of proof, that the testator had the notes in his possession at the time of his decease, (the bill being for the benefit of the estate.) *Mossop* v. *Eadon*, is the case of a bill cut in halves, and one part only lost. In such a case, I understand, there has never been any difficulty in recovering at law, even where the bill or note is strictly negotiable, and had been negotiated. This case was tried by the master of the rolls, who seemed to suppose, as almost all the

elementary writers upon the subject do, that *Walmsley* v. *Child* had settled the law, that the court of chancery had no jurisdiction in the case of a lost note to grant relief, except where an indemnity was necessary. *Bromley* v. *Holland* is upon a totally different subject, that is, whether a court of equity will sustain a bill to decree the surrender of an impeached bill or note to be cancelled. The decision is in favor of the jurisdiction. The subject of equity jurisdiction in regard to lost instruments, is introduced in the opinion *arguendo*, merely to illustrate the subject in hand. The case of *Davies* v. *Dodd* is a mere *dictum* at most. In that case the only indemnity tendered was the bond of the plaintiff, and he, confessedly irresponsible. Still, the jurisdiction was entertained, and the case referred to the deputy remembrancer to determine upon the sufficiency of the indemnity offered, and if any other was requisite, what was sufficient.

There certainly does seem to be a good deal of confusion with chancellors and elementary writers, in stating precisely the grounds of equity jurisdiction upon this subject. But the cases all show that the courts continue to retain the jurisdiction in all cases brought before them, and afford relief in every case where the proof is sufficient. This is a settled point. The only confusion is in shaping the basis of the jurisdiction, so that it shall not appear to be an usurpation of the appropriate functions of a court of law. Under such circumstances it might argue inexcusable presumption to attempt to put the matter in a clear light. But it seems to me, that the efforts, which have been made to follow the rule laid down by Lord Hardwicke, in *Walmsley* v. *Child*, have led to most of the confusion upon the subject. And a fanciful effort, apparent in almost all elementary writers upon all subjects, to reduce their subject to a few simple general propositions, and then make all the cases bend to those principles, has made all the rest.

And first, in regard to the case of *Walmsley* v. *Child*. Mr. Justice Story says, (Eq. Ju. p. 100, in note,) "The passage is singularly obscure, and of difficult interpretation; and I have not been able to satisfy my mind, what Lord Hardwicke's real doctrine was, or what were the three cases to which he alluded." The three cases of Lord Hardwicke are very apparent to us. 1. "If the deed, or instrument concede the title of land, and

possession prayed to be established." 2. "Another case is of a personal demand, where loss of a bond, a bill in equity on that loss, to be paid the demand." 3. "Another case, in which you may come into this court on a loss is, to pray satisfaction and payment of it upon terms of giving security." But this case is put mainly upon the ground of the want of an affidavit of the loss accompanying the bill. Lord Hardwicke, more than once, says that such an affidavit is indispensable to the jurisdiction. The same course of reasoning is pursued in *Whitfield* v. *Fawssett*, (1 Ves. 387.) In *Walmsley* v. *Child*, there was neither an affidavit of loss nor offer of indemnity, but the affidavit is no doubt indispensable. Without that, the whole proceeding may be a mere contrivance to change the jurisdiction, while the plaintiff all the while has his note in his pocket. With this safeguard, there seems to me to be no difficulty in maintaining the jurisdiction upon grounds well recognized in courts of equity.

It is obvious, there will be two classes of cases where a court of equity will be called upon to interfere in the case of lost instruments; perhaps three. 1. The holder or loser of such instruments will apply for a decree of payment. 2. If the loser chooses to proceed at law, the maker may apply to a court of equity to decree him a suitable indemnity. 3. The loser may apply to a court of equity for a discovery merely in aid of a court of law.

In regard to the first case, so far as promissory notes *not negotiable* or not *negotiated*, where the loser may sue at law, the principal ground of the jurisdiction must be the necessity of a discovery and the accident, by which that, which the parties have constituted their contract, has become incapable of performing its destined office. A court of equity will grant relief in all cases of accident or mistake, where one party has thereby put it out of his power to obtain what it was intended he should enjoy. So too, according to the English equity practice before the time of Lord Thurlow, and which has been adopted as the standing rule of practice in this country, the plaintiff may, in every case of a bill for discovery, pray relief if he choose; and if upon obtaining the discovery the case seems to be one, not specially requiring to be heard in a court of law, for the purpose of a jury trial, or some other, then the court of equity will, in their discretion, proceed and determine the case. In

practice, in this country, the case is almost uniformly determined in the court of equity, when once carried there, even for a discovery. And for this purpose, all that seems necessary to us to found a jurisdiction for relief, is a bill for discovery, alleging a defect of proof at law, by reason of the loss of the note, with a prayer for relief, and an affidavit of the loss. The offer of indemnity seems to be a matter in which the defendant is solely interested, and not to form any just basis of an equity jurisdiction on the part of the plaintiff, unless it is wholly to oust the legal forum, which it has not yet done, except in the case of paper negotiated. The indemnity is a matter in which it seems to us safe to suffer the defendant to move.

2. If the bill is brought by defendant to restrain the loser of the note from proceeding at law until he gives the maker indemnity, then, indeed, the necessity for indemnity is the *sole ground of the jurisdiction*. The case *will*, in this view, turn exclusively upon the question of the defendant's being entitled to indemnity. If that point is made out, the case will be finished in the court of equity; if not, the bill will be dismissed. But that the plaintiff's case should be made to rest *for its jurisdiction*, upon offering an indemnity to defendant, which he may or may not be entitled to, is certainly not consistent with our views of sound chancery law.

3. If the party seeks a discovery merely, he is not required to make affidavit of the loss. And where he seeks relief also, and omits to make affidavit of the loss upon filing the bill, he may, no doubt, amend in this particular; and if the defendant omit to demur, but answer admitting the loss, the want of an affidavit is no ground of dismissing the bill. *Findley* v. *Hinde*, (1 Peters, 241–244); *Livingston* v. *Livingston*, (4 Johns. Ch. R. 294); 1 Daniell's Ch. Pr. 449, 450 and notes, Perkins's ed.

But in the present case there is an affidavit; and we think there is not now, the claim being barred by the statute of limitations, if there ever was, any necessity of an indemnity to defendant. The decree of the chancellor must be reversed, and a decree for the plaintiff without indemnity and without costs. We deny costs to the plaintiff, because there was something in the account which he gave of the loss, calculated to excite apprehension, that his story might be somewhat apochry-

phal. Had the defendants come into court and moved for an indemnity to be allowed them in the first instance, and deposited the money, subject to the order of the court, we should have allowed them costs up to that time, and since that time, unless made by their own needless resistance to a proper decree.

Abstracts of Decisions of the Supreme Court of Pennsylvania, Western District. October Term, 1848.

[From the American Law Journal for November.]

Sinnett v. *Johnson's Administrators.* — Where testimony is offered some of which is competent and some incompetent, the court may reject the whole and are not bound to sift out what is relevant. Per Rogers, J.

Champlin v. *Williams.* — If several persons buy land as tenants in common, whether the title be made to all or to one in trust for the rest, and one of them is compelled in default of the rest to pay a mortgage which all were equally bound to pay, the advancing owner may protect himself by taking an assignment of the mortgage and enforce it to reimburse himself. Per Coulter, J.

Lowry v. *Coulter.* — The confession of a judgment preferring a creditor not present nor otherwise actually accepting it, and the issuing an execution at the debtor's request sweeping all his personal property from other creditors, is one mode of legal preference good at common law and unimpeached by the statute of Eliz. Such preference does not establish a legal conclusion of fraud, nor legal presumption that the debt was fictitious.

A defendant in an execution may dispense with the sheriff's taking actual possession of his goods when levied upon, as between himself and the officer, but such waiver will not bind other creditors who may levy upon goods not actually seized upon or within his view, control or power.

An order "to proceed no further" directed to the sheriff

will postpone the lien of a levy whether it proceed from plaintiff or defendant with plaintiff's permission.

An unauthorized amendment of a sheriff's return is void, and the extent of the authority to amend is to be measured by the facts spread forth in the affidavit grounding the motion and order to amend.

A sheriff's return is evidence of facts legitimately set forth in it, only in the cause in which it is made. Of facts incidentally in question in a contest with a third party, it is only *prima facie* evidence. Of facts introduced into it by amendment without leave, it is no evidence at all.

Smith & Greenwood v. *Ellcott.* — A verdict in a former case of nuisance may be given in evidence in an action for its continuance under the plea of not guilty but it is not an estoppel, as it would be if pleaded.

Simpson v. *Stackhouse.* — The presumption of law that an alteration in an obligation is a legitimate part of it until the contrary appears does not extend to negotiable securities. The holder of commercial paper is bound to show that any apparent alteration of its face was made under circumstances not affecting its validity. Per Gibson, C. J.

Coleman v. *Carpenter.* — A presentment for payment and notice of non-payment made on the last day of grace of a promissory note is in proper time, nor is there any distinction in this respect between foreign and inland bills. Suit cannot however be brought thereon until the next day. Per Gibson, C. J.

Forsyth & Co. v. *Walker & Co.* — When a forwarding merchant altered the marks on goods consigned to him from "T. F." to "T. Flanagan," and in consequence thereof they were seized and sold as the property of said Flanagan (not being the real owner) and thus lost, the forwarder is responsible. Per Rogers, J.

Graff v. *Bloomer.* — A contract to deliver merchandise at the city of Pittsburgh is not performed by its delivery at the city of Allegheny, although the aqueduct forming part of the canal and the communication between those cities was broken down, some months before the date of the bill of lading. Per Bell, J.

Recent English Decisions.

Court of Exchequer, Trinity Term, 1848.

Molton *v.* Camroux.

(From 12 Jurist, 790.)

Lunacy — Contract — Annuity Deed — 53 Geo. 3, c. 141.

When a person apparently of sound mind, and not known to be otherwise, enters into a contract, which is fair and *bonâ fide* and which is executed and completed, and the property, the subject-matter of the contract cannot be restored, so as to put the parties *in statu quo*, such contract cannot afterwards be set aside either by the alleged lunatic or those who represent him; and therefore,

In an action by the personal representative of a lunatic to recover from an assurance society the price of two annuities on his life paid by the deceased to the society, a special verdict found, that the purchasing of the annuities were transactions in the ordinary course of the affairs of human life, and that the granting of the annuities were fair transactions and of good faith on the part of the society, without any knowledge or notice on the part of the society of the unsoundness of the mind of the deceased: — *Held*, that the action could not be maintained.

The want of enrolment of an annuity deed as required by the 53 Geo. 3, c. 141, cannot be set up by the grantee of the annuity.

This was an action of assumpsit brought by the administratrix of Thomas Lee, against the defendant as secretary of "The National Loan Fund Life Association Society," enabled by stat. 1 & 2 Vict. c. xcii. to be sued in the name of its chairman, secretary, or any of its directors. The declaration consisted of counts for money had and received by the society to the use of the deceased, and on an account stated with him; also for money had and received by the society to the use of the administratrix, and on an account stated with her. The defendant pleaded the general issue. At the trial before the lord chief baron it appeared that, on the 29th August, 1843, proposals were made to that society by the deceased Thomas Lee for the purchase of two annuities on his life. The first was an annuity of 21*l.* 12*s.* 10*d.* payable on the 20th August in each year, the first payment to be made on the 9th August, 1844; and the other a deferred annuity of 30*l.* for life, to commence when the deceased should attain the age of sixty years, which would be on the 30th June, 1864, the first payment to be on the 30th June, 1865; with an option to the grantee of receiving from the society, on his attaining the age of sixty years in lieu of that annuity, the sum of 293*l.* 5*s.* in cash payable immediately, or the deferred sum of 377*l.* 5*s.* to

be paid to his representatives after his death. The consideration for the first of these annuities was 350*l.* paid down; and for the other 5*l.* 6*s.* 2*d.*, payable immediately, with a like sum every half year up to the 29th August, 1863. These proposals having been assented to and accepted by the society, policies embodying their terms were drawn up and executed on the same day, and the stipulated sums of 350*l.* and 5*l.* 6*s.* 2*d.* then paid by the deceased to the society. These sums his administratrix now sought to recover back, on two grounds. First, that at the time when the above contracts were entered into and those sums paid, the deceased was of unsound mind and incapable of contracting, so as to render any contracts made by him either no contracts at all or at least not valid ones; and secondly, that the policies were null and void; as being annuity deeds within the 53 Geo. 3, c. 141, and no memorial of either having been enrolled in chancery pursuant to that statute. The jury having found the facts of the case, a verdict was entered for the plaintiff, with leave reserved to the defendant to move to enter a nonsuit on both points.

Gurney, in Hilary term, 1847, obtained a rule accordingly, with leave to turn the facts into a special verdict if the other side would consent. A special verdict was agreed on; which, in addition to the facts already stated, found that "the said intestate Thomas Lee, on the said 29th day of August, 1843, and at the time of the making of the said proposals, and of the assenting thereto and acceptance thereof, and of the granting of the said annuities, and of the payment of the said sums of 350*l.* and 5*l.* 6*s.* 2*d.*, was a lunatic and of unsound mind so as to be incompetent to manage his affairs, but of this the said society had not at that time any knowledge; that the purchasing of the said annuities by the said Thomas Lee as aforesaid, were transactions in the ordinary course of the affairs of human life, and that the granting of the said annuities to the said Thomas Lee in manner and upon the terms aforesaid, were fair transactions, and transactions of good faith on the part of the said society, and in the ordinary course of their business, and that the said Thomas Lee at the time of the making of the said proposals, and at the time the said proposals were so assented to and accepted by the said society, and of the granting of the said annuities, and of the payments of the said two sums of 350*l.* and 5*l.* 6*s.* 2*d.*, appeared to the said society to be of

sound, though he was then in fact of such unsound mind as aforesaid." It likewise found that no commission of lunacy issued against the deceased; and that no payment was ever made by the society on account of the said annuities or either of them; but that the society was always ready and willing to pay any sums due by them under the agreements, and never attempted to avoid them or either of them.

This special verdict was argued in Hilary term, 1848, on the 17th and 21st January, before Pollock, C. B., Parke, Alderson, and Platt, BB.

Needham for the plaintiff. — The first and principal question is — can the personal representative of a lunatic recover as received to the use, either of the deceased or himself, money which has been paid by the deceased in virtue of a contract made by him with a person who has entered into it in good faith and in ignorance of the lunacy. It is an established principle of law that a person who is *non compos mentis* cannot contract, for he has no agreeing mind, and consequently any agreements to which he may apparently have assented are not merely voidable but void *ab initio*. *Furiosus nullum negotium gerere poterit; quia non intelligit quod agit*, (Inst. lib. 1, tit. 20, l. 8,) was the maxim of the Roman law, and has been recognized by the text-writers of every country. Thus Pothier, in his Treatise on Obligations, No. 3, says "a contract is a particular kind of agreement; to understand the nature of a contract, we should therefore previously understand the nature of an agreement. An agreement is the consent of two or more persons to form some engagement, or to rescind or modify an engagement already made, '*Duorum vel plurium in idem placitum consensus;*' (lib. 1, l. 1, Ff. de Pact.[1]) That kind of agreement the object of which is the formation of an engagement, is called a contract." And in No. 49 he says "The essence of a contract consisting in consent, it follows that a person must be capable of giving his consent, and consequently must have the use of his reason in order to be able to contract. It is therefore evident that children, persons wholly destitute of reason, and such as are occasionally so during the continuance of their infirmity, cannot contract by themselves, but they may contract by the ministry of their tutors or curators. It is evi-

[1] The passage will be found more easily by the natural mode of reference — Dig. lib. 2, tit. 14, l. 1, § 1.

dent that drunkenness, when it goes so far as absolutely to destroy the reason, renders a person in this state, so long as it continues, incapable of contracting, since it renders him incapable of consent." Many instances, illustrative of this general principle, may be found in our law. Thus there was the old writ of *Dum fuit non compos mentis*, which lay to recover back land aliened by a party not in his right mind; (Fitz. N. B. 202, C.) So a person *non compos mentis* cannot make a will, (6 Co. 23); nor suffer a recovery, (*Hume* v. *Burton*, 1 Ridgw. Parl. Ca. 16, and *Keene* v. *Keene*, there referred to, p. 91); nor execute a deed, *Yates* v. *Boen*, (2 Stra. 1104); nor a bond, *Faulder* v. *Silk*, (3 Camp. 126); nor indorse a bill of exchange, *Alcock* v. *Alcock*, (3 M. & Gr. 268); nor state an accouut, *Tarbuck* v. *Bispham*, (2 Mee. & W. 2); and in the case of *Clerk* v. *Clerk*, (2 Vern. 442), it was expressly laid down by the court of chancery, that a family settlement to which a lunatic is party, although reasonable in other respects, and for the convenience of the family, ought to be set aside in equity. The case of *Neill* v. *Morley*, (9 Ves. jr., 478,) may be cited, but it decides nothing. So the marriage of a lunatic is void. In *Turner* v. *Meyers*, (1 Hagg. C. R. 414,) Sir W. Scott says, "It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own *past* incapacity, and also that a defect of incapacity invalidates the contract of marriage as well as any other contract." [*Alderson*, B. — Would that be so unless his lunacy was apparent to the woman at the time of the marriage? *Pollock*, C. B. — I remember a case where a marriage was set aside on the ground of lunacy in one of the parties, although there was not the slightest evidence that the other knew of it, and they had lived together for years. I thought the case a very strong one.] In *Howard* v. *The Earl of Digby*, (2 Cl. & Fin. 661,) Lord Chancellor Brougham says, "The law on this point is as clear both in equity and in lunacy and at common law as that a man's eldest legitimate son is his heir to freehold land. A lunatic cannot bind himself by bond or by bill; a lunatic cannot release a debt by specialty; cannot be a cognizor in a statute-merchant, staple, a judgment, warrant of attorney or any other security." So in *Palmer* v. *Parkhurst*, (1 Ch. Ca. 112,) where the defendant had taken an assignment of a debt from a lunatic,

but without valuable consideration and to the prejudice of the lunatic, the defence was that at the time of the sale, the party was not lunatic; and it was shown that he usually bought and sold at that time, and was not found lunatic until eight years after, the court set aside the bargain. [*Parke*, B. — Was it suggested there that the defendant knew at the time of the bargain that the plaintiff was a lunatic?] No. [*Pollock*, C. B. — That case may be equity; but I do not know that it is law.] This court has recently decided on the subject of intoxication, that all acts done by a man so totally drunk as not to know what he is about are void; *Gore* v. *Gibson*, (13 Mee. & W. 623.) [*Parke*, B. — At the end of the report of that case in the 9 Jur. 140, there is a note, in which it is shown that the old doctrine that a man cannot be allowed to stultify himself has been very properly altered in modern times. That rule has unquestionably been modified to a considerable extent, but the doubt is has it been entirely put an end to. *Alderson*, B. — There is this distinction between the cases of insanity and intoxication, that the latter is always a patent objection, the former may not be patent. — Any one can see if a man is dead drunk, but there are cases in which it is almost impossible to decide by inspection whether a man is sane or not.] A lunatic is not responsible *criminally* for anything, even high treason; *Reg:* v. *Oxford*, (9 C. & P. 525); answers of the judges to the house of lords, (1 C. & K. 134; 7 Jur. 250, part 2.) [*Alderson*, B. — That is on the principle "*actus non facit reum nisi mens sit rea.*" A lunatic who kills a person is no more guilty of murder than a man walking in his sleep who takes up an infant, and thinking it a bale of goods throws it out of a window by which it is killed.[1]] On the same principle no

[1] In the Prolegomena to Matthew's Treatise, "De Criminibus," ch. 2, s. 13, there is a curious discussion as to whether acts done by persons in a state of somnambulism are not punishable *in certain cases*. The following is the most important passage, especially on account of the instance which it relates: — "Videndum, solitusne sit reus de nocte surgere, aliosque invadere necne; ut si solitus non fuerit, impunè ferat: aliter puniatur nomine culpæ quia sciens vitium, solus dormire debuit, aut ancipiti claustro firmare cubile suum. Culpæ illud quoque adjiciendum censeo, si aluerit inimicitias, inprimis capitales, quibus per somnum instigantibus surrexit, adversariumque occidit. Idque fieri posse historia testatur: Refert enim interpres quidam Hippocratis contigisse Lutetiæ Parisiorum, uti noctambulo gladio cinctus Sequanam transierit, interfectoque eo, *quem cædere vigilans statuerat*, domum redierit." See Ray's Medical Jurisprudence of Insanity for other cases of homicide while in a state of somnambulism.

contract can be made with a lunatic who has no assenting mind. [*Pollock*, C. B. — There can be no doubt that a lunatic is liable in case or trespass for a civil injury. *Parke*, B. — Or a lunatic innkeeper for the loss of the goods of his guest; *Cross* v. *Andrews*, (Cro. El. 622).] Those cases rest on the principle of necessity, besides there the remedy is against the estate not the person of the lunatic. It is true that there are some apparent exceptions, in which contracts made by lunatics are enforced by law; but they all rest on peculiar reasons of their own, and rather confirm the general principle than impugn it. One is, that a *fine* levied by a lunatic was good; *Thompson* v. *Leach*, (3 Mod. 305); *Needler* v. *The Bishop of Winchester*, (Hob. 224); but the reason of that is that as a fine must have been levied in the presence of a judge, the law presumed that he would not have allowed it to be levied unless the parties were of sound mind. That is so stated in *Beverley's case*, (4 Co. 123 b); and is confirmed by the statute 18 Edw. 1, st. 4, the "*modus levandi fines*," and the 10 Edw. 2, "*de finibus;*" by the first of which the parties to a fine are required to be of full age, *of good memory*, and out of prison; and in the latter the king directs the justices that before levying a fine "the parties shall appear personally, so that their age, idiocy or any other default (if any be) may be judged and discerned by them." This is strongly illustrated by *Mansfield's case*, (12 Co. 123); where a fine had been levied by a deformed person who was an idiot *à nativitate*, and a party claiming under the fine brought an action of trespass against a farmer of the lands. The idiot was sent out of the court of wards to be shown to the judges of the common pleas and to the jury; and being brought on a man's shoulders, the judges hearing that the title of the plaintiff was under a fine levied by that idiot, a juror was withdrawn; and Lord Chief Justice Dyer said that the judge who took the fine was never worthy to take another. "But," continues the report, "notwithstanding this, and although the monstrous deformity and idiotcy was apparent and visible, *yet the fine stood good*." The next exception is that a *feoffment* by a lunatic is good; but the true reason of that appears from the above case of *Thompson* v. *Leach*, as reported in Carth. 435, where the court say "There is a difference between a feoffment and livery made *propriis*

manibus of an idiot, and the bare execution of a deed by sealing and delivery thereof, as in cases of surrenders, grants, releases, &c., which have their strength only by executing them; and in which the formality of livery and seisin is not so much regarded in the law; and therefore the feoffment is not merely void, but voidable; but surrenders, grants, &c. by an idiot are void *ab initio*." The third exception mentioned in the books is that a lunatic may contract for *necessaries;* but the expression is not a very correct one; it should be that a lunatic *is liable* for necessaries; and the law allows this for his benefit, as otherwise he might be starved. [*Platt*, B. — Still that liability rests on a contract implied by law. *Parke*, B. — A declaration alleging that you supplied goods to a lunatic would be bad unless you stated that he contracted.] In the German law there is an intermediate class of cases called "*quasi* contracts," under which the present would be ranged i. e. contracts not made by the parties but still binding on them. [*Alderson*, B. — It comes to the same thing. What we call *implied* contracts foreign lawyers call *quasi* contracts.] The authorities do not proceed on the supposition of an actual agreement by the lunatic. In *Manby* v. *Scott* (1 Sid. 112,) it is said that an infant is liable for necessaries, and also an idiot. The case of infancy however differs in this, that contracts made by an infant are not absolutely void, and are only voidable at his election. The leading case on this part of the subject is *Baxter* v. *The Earl of Portsmouth*, (5 B. & C. 170); there a tradesman having supplied the defendant with goods suited to his station, and afterwards by an inquisition taken on a commission of lunacy he was found to have been lunatic, both before and at the time when the goods were ordered and supplied, Lord Tenterden held that the plaintiff was entitled to recover; and this ruling was confirmed by the court of queen's bench. Lord Tenterden in delivering judgment says, "At the time when the orders were given and executed Lord Portsmouth was living with his family, and there was no reason to suppose that the plaintiff knew of his insanity. I thought the case very distinguishable from an attempt to enforce a contract not executed, or one made under circumstances which might have induced a reasonable person to suppose the defendant was of unsound mind. The latter would

be cases of imposition ; and I desired that my judgment might not be taken to be that such contracts would bind, although I was not prepared to say they would not." In *Gore* v. *Gibson*, already cited, Pollock, C. B., says "With regard to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between *express* and *implied* contracts. Where the right of action is grounded upon a distinct specific contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract ; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances ; in fact the law itself makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract. So a tradesman who supplies a drunken man with necessaries may recover the price of them if the party keeps them after he becomes sober, although a count for goods bargained and sold would fail. In this case the defendant is still liable for the consideration of his indorsement, although the indorsement itself can give the plaintiff no title." [*Parke*, B. — Lord Coke in *Beverley's case*, mentions a fourth exception, viz. the case of a recognizance ; he says that if a man *non compos mentis* "levies a fine or suffers a recovery or acknowledges a statute or recognizance, neither his heir nor his executors shall avoid it." I suppose, you say, that so far as relates to a recovery this is overruled by *Hume* v. *Burton*, and that the court is bound to take care that a man who enters into a recognizance is in a fit state of mind to do so.] Yes. [*Platt*, B. — Do you argue that if the intestate had received these annuities for several years he could have recovered back the money he had paid for them on the ground that he was insane at the time of the contract ?] The *contract* would be void, but the receipt of the money might act as an estoppel *en pais*. [*Alderson*, B. — If a lunatic cannot bind himself by his contract how can he by his act of acceptance ? The action for money had and received, which this is, is commonly described as being an equitable action ; you are seeking to make it a most *in*equitable one. *Platt*, B. — In the case of *Dane* v. *Viscountess Kirkwall*, (8 C. & P.

679,) it was held by Mr. Justice Patteson at nisi prius, and afterwards confirmed by the court of queen's bench, that it was no answer to an action to prove that the defendant was lunatic without further showing that the opposite party knew and took advantage of it. *Pollock*, C. B. — Is there any precedent for a plea of lunacy, drunkenness, or other matter of that sort without the averment of notice of the fact by the plaintiff?] Yes; it does not appear that the plea in *Yates* v. *Boen*, contained such an averment, and there may be other instances. In the passage already cited from Pothier, he treats the transaction as void on the simple ground of want of reason in the contracting party, and irrespective of fraud, notice, or other extraneous considerations: and in No. 50 he takes the following distinction between persons incapacitated from contracting by law and those incapacitated by nature, "It is the civil law only which renders persons under an interdict for prodigality incapable of contracting: for these persons know what they do; the consent which they give is a real consent, which is sufficient to form a contract." The learned pleading of Chancellor D'Aguesseau in the case of *The Abbé D'Orléans*, given in the Appendix to Evans's Pothier, confirms this view. [*Alderson*, B. — Suppose a contract by a lunatic is advantageous to him and he seeks to enforce it, can the other party object the lunacy against him?] Certainly, the contract is void for all purposes.

On the second point, *Needham* contended that the non-compliance with the provisions of the statute of enrolment rendered a contract absolutely void to all intents and purposes. [He referred to *Crossley* v. *Arkwright*, (2 T. R. 603); *Saunders* v. *Hardinge*, (5 T. R. 9); *Dann* d. *Dolman* v. *Dolman* (Id. 641); *Weddell* v. *Lynam*, (1 Esp. 309); *Waters* v. *Mansell*, (3 Taunt. 56); *Huggins* v. *Coates*, (3 Q. B. Rep. 432.) Also to the observations on the construction of statutes by Parke, B., in *Becke* v. *Smith*, (2 Mee. & W. 185,) and by Erskine, J., in *Biffin* v. *Yorke*, (5 M. & Gr. 428).]

The Court said that on the second point, both reason and authority were against the plaintiff. It did not lie in the mouth of the grantee in an annuity deed who had omitted to register it, to profit by his own default and set up that want of registration against the grantor. They considered the law on this sub-

ject to have been settled by the cases of *Davis* v. *Bryan*, (6 B. & C. 651); *Churchill* v. *Bertrand*, (2 G. & Dav. 548; 6 Jur. 855); *Cowper* v. *Godmond*, (9 Bing. 748,) &c.

Gurney for the defendant, (having been directed by the court to confine himself to the first point). — It may be conceded, at least for the purpose of the present argument, that an *unexecuted* contract by a lunatic cannot be enforced; but where the contract is for valuable consideration and *executed*, the mere fact of one of the parties being lunatic is insufficient to avoid it, and the law will imply a contract by him, unless it can be shown that the other party had notice and took advantage of the lunacy, The privileges of lunatics are like those of infants, which are stated by Lord Mansfield in *Parsons* v. *Zouch*, (1 W. Bl. 575,) to be "A shield and not a sword; to protect from fraud and oppression, and not to be turned into an offensive weapon to assist fraud and oppression." It is incorrect to suppose that all the old cases in which the acts of lunatics have been upheld rested on the maxim that a man shall not be allowed to stultify himself. On the contrary, several of them proceed on the principle that the transaction was a fair and equal one between the parties. So it was in the case of exchange and partition. Thus Perkins, 59 b, says "Si home de non sane memorie esteant seisi del terre en fee eschange mesme le terre ove estrange pur auter &c., et le eschange est execute, et cesty de non sane memorie devye et son heire entre en le terre prise en eschange par son pier ore il ne defetera cest eschange," &c. So in Co. Litt. 166. a. "If coparceners make partition, of full age and unmarried, and of sane memory, of lands in fee simple, it is good and firm forever, albeit the values be unequal; but if it be of lands entailed, or if any of the parties be of non-sane memory, it shall bind the parties themselves, but not their issues *unless it be equal*." And in Bac. Abr., "Idiots and Lunatics," (F.) "The feoffment of an idiot or *non compos* is not void; but voidable; but it cannot be avoided by himself by entry, &c., and the reason hereof given in some books is, because no man by law is permitted to disable himself. The better reason in this case seems to be, that anciently these feoffments were made not only for the benefit of the parties, but of the realm, being annually paid for by the attendance of the tenants in military service, or in tillage, and

so were presumed to be equally for the benefit of the lord and tenant, and therefore they were not holden to be void in themselves. And though an infant, at the age of discretion defined by the law, may avoid them, and choose which is most for his benefit; yet as to a person of non-sane memory, there being no time defined when he recovers his senses, he cannot avoid such acts of his own by any subsequent act of his. This view is supported by several modern authorities; of which *Dane* v. *Viscountess Kirkwall*, to which reference has already been made, is one. In the case of *Sentance* v. *Poole*, (3 C. & P. 1,) where in an action by the indorsee of a promissory note against the maker, the defence being imbecility of mind; Lord Tenterden in summing up said "The question is whether the defendant at the time he put his name to this note was conscious of what he was doing; for if he was there must be a verdict for the plaintiff; but should you be satisfied that he was not conscious of what he was doing, and that he was imposed upon by reason of his imbecility of mind, you ought to find for the defendant." In *Browne* v. *Joddrell*, (1 M. & M. 103) also, Lord Tenterden expressly held that in an action on a contract it is no defence that the defendant is of unsound mind unless it be shown that the plaintiff knew of the fact and used it to impose on him; and adds that he once acted on that rule and that his opinion was confirmed by the court. The reporters of that case refer in a note to an unreported case of *Levy* v. *Baker*, decided by Best, C. J., in 1827, to the same effect. The usual form of pleading bears out our view; for it is usual to aver that the opposite party had notice of the lunacy, intoxication, &c. The present case is exactly like those where it is sought to recover the premium on a void insurance, in which it is an established principle that the attempt to set aside the contract and recover the money must be made before the risk is run and the contract executed: per Buller, J., in *Lowry* v. *Bourdieu*, (2 Dougl. 468); *Andree* v. *Fletcher*, (3 T. R. 266); *Lubbock* v. *Potts*, (7 East, 447); *Morek* v. *Abel*, (3 B. & P. 35.) Courts of equity have refused in several cases to set aside the acts of lunatics. *Selby* v. *Jackson*, (6 Beav. 192,) is an instance of this; and in *Addison* v. *Dawson*, (2 Vern. 678,) where the defendant got a mortgage from a lunatic and afterwards an absolute purchase at a great under-

value, by deeds, fines and recoveries; and a considerable sum had been paid into the hands of one of the defendants who pretended to have stated an account but had not made any proof; the court set aside the purchases and stated account, but they decreed the defendant to be allowed what he should prove he had paid for the use and benefit of the lunatic: and in *Niell* v. *Morley*, it refused to set aside a contract by a lunatic, chiefly as it should seem on the principle that at the time of making it he was going about and transacting his business. With respect to the authorities which are relied on by the other side, the word "*furiosus*" in the passage cited from the Roman law, means a raging madman whose state must be apparent to any one.[1] In *Palmer* v. *Parkhurst*, the want of value and fraud to the prejudice of the lunatic were charged in the plaintiff's bill, and not denied by the defendant in his answer; and in *Clerk* v. *Clerk*, the conveyance was voluntary and without valuable consideration. *Tarbuck* v. *Bispham*, which has been cited to show that a lunatic cannot state an account, was decided on other grounds, the court saying that if the question turned on that point they would grant a rule. Then as to *Howard* v. *The Earl of Digby*, the lord chancellor, after using the language which has been quoted, goes on to show that in certain cases the law will imply a contract notwithstanding lunacy. The other side wish to treat the case of necessaries as an exception to a general rule, and resting on a foundation of its own; but that is a fallacy — the fact that articles supplied to a lunatic were necessaries for his station in life being merely an element in the proof that the bargain with him was a fair one and for his benefit. In many of the cases cited, viz. *Browne* v. *Joddrell*, *Dane* v. *Viscountess Kirkwall*, &c. the action was not for necessaries; and although it was otherwise in *Baxter* v. *The Earl of Portsmouth*, the judgment does not proceed on that ground; and the same may be said of *Williams* v. *Wentworth*, (5 Beav. 325.) As to the effect of lunacy in criminal law — it is not quite correct to lay down that a lunatic may commit treason or murder with impunity; it would be more proper to say that he cannot be guilty of what

[1] See acc. Inst. lib. 1, tit. 23, ss. 3 and 4, with Vinnius's Commentary. "Mente captus" seems to have been the expression used by the Roman lawyers to designate a person of unsound mind. Ib.

the law calls treason or murder. [*Parke*, B. — Lord Coke, in *Beverley's case*, says that a person *non compos mentis* may be guilty of high treason if he kills or offers to kill the king.] That is inconsistent with *Hatfield's case*, (27 How. St. Tr. 1307,) where the prisoner who was charged with an attempt to shoot the king was acquitted on the ground of insanity.[1]

Needham having been heard in reply on the first point,

Cur. adv. vult.

The judgment of the court was now delivered by

Pollock, C. B. — When this case was argued the court expressed a clear opinion that the objection on the ground of want of enrolment of these instruments could not be supported. But on the other point we took time to consider, and upon deliberation, we are all of opinion that upon the finding of the jury that the purchasing of the said annuities were transactions in the ordinary course of the affairs of human life, and that the granting of the said annuities were fair transactions and of good faith on the part of the society; without any knowledge or notice on the part of the society of the unsoundness of mind of the deceased, the action is not sustainable, and our judgment must be for the defendant.

As to the rule of the common law the older authorities differ — according to the opinion of Littleton, s. 405, and Lord Coke, 1 Inst. 247 b. and *Beverley's case*, (4 Rep. 123,) (disagreeing with Fitz. N. B. 202,) no man could be allowed to stultify himself, and avoid his acts, on the ground of his being *non compos mentis;* but certainly the law did not allow the party himself to set aside by any plea of insanity, acts of a public and notorious character, such as acts done in a court of record, and feoffments with livery of seisin, the doing or executing of which would not presumably be allowed unless a party appeared to be of sound mind.

But the rule as above laid down by Littleton and Coke has no doubt in modern times been relaxed, and unsoundness of mind (as also intoxication) would now be a good defence to an action upon a contract, if it could be shown that the defendant

[1] There is considerable discrepancy in the old authorities on this subject. See in addition to those above cited, 3 Inst. 6; Dalton, 330, edit. 1677; 2 Rol. 324; 1 Hale, P. C. 30; 1 Hawk. P. C. 2, &c. The greater number however are in accordance with the modern practice, and the sense and justice of the matter.

was not of capacity to contract, and the plaintiff knew it — the cases of *Dane* v. *Viscountess Kirkwall*, (8 C. & P. 679,) and *Gore* v. *Gibson*, (13 Mee. & W. 623; 9 Jur. 140,) were cited to prove this, and their authority fully supports the doctrine contended for. The plaintiff's counsel distinguished the cases of *Brown* v. *Joddrell*, (1 M. & M. 105,) *Baxter* v. *The Earl of Portsmouth*, (2 C. & P. 178,) and other cases of that sort, on the ground, that necessaries furnished to a lunatic were an exception to the general doctrine that he could not make a contract, and he cited the judgment of the lord chief baron in the case of *Gore* v. *Gibson*, as showing a distinction between express and implied contracts, and deciding that all express contracts were void if the parties to them were incapable of making a contract. On the other hand it was argued by the defendant's counsel that there was a distinction between contracts executed and executory — that executory contracts could not be enforced, but that executed contracts could not be disturbed, if made in good faith and without notice of the incapacity, and he called our attention to this, that no case had yet decided that an executed contract, if perfectly fair and *bonâ fide*, could be questioned on the ground of the unsoundness of mind of one of the parties, and he cited the cases of *Howard* v. *The Earl of Digby*, (2 Cl. & Fin. 634); *Williams* v. *Wentworth*, (5 Beav. 325,) and *Selby* v. *Jackson*, (6 Beav. 192,) to show that the house of lords in the first case, and Lord Langdale in the two last, had recognized the liability of lunatics or their estate, in respect of contracts *bonâ fide* acted upon — the case of *Niell* v. *Morley*, (9 Ves. jr. 478,) before Sir William Grant to the same effect had been cited by the counsel for the plaintiff.

As far as we are aware this is the first case in which it has been broadly contended that the executed contracts of a lunatic must be dealt with as absolutely void, however entered into, and although perfectly fair, *bonâ fide*, reasonable, and without notice on the part of those who have dealt with the lunatic.

On looking into the cases at law we find that in *Browne* v. *Joddrell*, Lord Tenterden says "I think the defence (of unsoundness of mind) will not avail unless it be shown that the plaintiff imposed on the defendant."

In *Baxter* v. *The Earl of Portsmouth*, (5 B. & C. 170,)

(the nisi prius authority of which is in 2 C. & P. 178,) Abbott, C. J., with the concurrence of the rest of the court, laid down the same doctrine.

In *Dane* v. *Viscountess Kirkwall*, Mr. Justice Patteson in directing the jury said "it is not sufficient that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it, and took advantage of it."

We are not disposed to lay down so general a proposition as that all executed contracts *bonâ fide* entered into must be taken as valid, though one of the parties be of unsound mind — we think however that we may safely conclude that when a person apparently of sound mind, and not known to be otherwise, enters into a contract, which is fair and *bonâ fide* and which is executed and completed, and the property, the subject-matter of the contract, cannot be restored, so as to put the parties *in statu quo*, such contract cannot afterwards be set aside either by the alleged lunatic or those who represent him.

On these grounds we think our judgment ought to be for the defendant. Judgment for the defendant.

Digest of Recent English Cases.

[The cases are all from the 12 Jurist, at the pages affixed to each case.]

HIGH COURT OF CHANCERY.

(*Jurisdiction — Injunction.*) The court of chancery has jurisdiction to restrain a party from petitioning parliament against a railway bill, upon a proper case being made out for the exercise of that jurisdiction. By the lord chancellor. *The Stockton and Hartlepool Railway Company* v. *The Leeds and Thirsk Railway Company*, 735.

When a party has agreed not to oppose a bill before parliament, the court has power to enforce that agreement by injunction. By the vice-chancellor. S. C. 713.

VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

(*Will — Construction — "Recommend."*) A testator gave £2000 to his wife, to be disposed of by her will in such a way as she should think

proper; but he *recommended* her to dispose one half among her own relations, and the other half among such of his relations as she should think proper. The widow gave of the £2000, £300 to a nephew of her husband, £100 to a stranger, £40 to a distant relative, and the rest among several nephews and nieces. It was *held*, that the word "recommend" did not create a trust, and that the widow had not exceeded the power in making the disposition of the fund. "The word recommend may mean 'command,' and may create a binding trust. The interpretation must depend upon the language of the particular instrument in which it is found." *Johnston* v. *Rowlands*, 769.

(*Will — Construction — "Trusting."*) A testator bequeathed stock to A. B. *trusting* that he would preserve the same, so that after his decease it might go to his four children, or to such of them as should survive him. It was *held*, to create a trust in favor of the survivor of the children, after the decease of A. B. The word "trusting" is a word of art, and plainly implies a trust. *Baker* v. *Morley*, 740.

(*Will — Construction — Gift in event of not marrying, nor having children.*) A testator gave in trust for his daughter, the interest of his property for her life, and after her death the same interest to her children, until they should be twenty-one years of age, and then the principal should be divided equally among such children; but, in the event of his daughter's "not intermarrying, nor having any such children, then the same property to be subject to her disposal, by will or otherwise." The daughter married, never had a child, became a widow, and being so, and being upwards of sixty-four years of age, filed a bill against the parties, in whose name the property was standing for a transfer of the same to her; and it was *held*, that the word "nor" must be read "not," and considering that the daughter was a widow of mature age, the court directed a transfer of the property to her. *Mackenzie* v. *King*, 787.

(*Apportionment of Dividends.*) By the directions contained in an indenture of settlement, the dividends of certain invested property, which were payable half-yearly, were to be paid to A. B. for life, and after his death the capital was given over. The tenant for life, after having received the dividends for more than twenty years, died thirteen days before one half yearly period payment, and it was *held*, that the half yearly income was not apportionable between the tenant for life and the remainder-man, but belonged wholly to the latter. *Warner* v. *Ashburner*, 784.

(*Injunction — Copyright of Designs.*) A person having invented a design, and registered it under the statute, obtained an injunction against another person who had manufactured with that pattern, but did not intend the same for sale until after the expiration of the plaintiff's term of protection, which injunction restrained the defendant generally, and ordered all articles manufactured, and things used in the manufacture, to be delivered up to be destroyed. *M'Crea* v. *Holdsworth*, 820.

(*Motion for Injunction to restrain a solicitor from acting in a suit.*) The executor and trustee of a testator's will for several years employed a solicitor in the matter of the will, and made confidential communications to him relating thereto, and never discharged him from being his solicitor. On a bill filed by the persons interested in the estate of the testator against the executor and trustee, charging him with mismanagement and breach of trust, the solicitor for the executor and trustee acted as solicitor for the plaintiffs, and, as the defendant alleged, in spite to him. Defendant moved for an injunction to restrain the solicitor from acting as solicitor to the plaintiffs in the suit; but it was refused, without costs, as not coming within the principle of *Cholmondley* v. *Clinton*, (19 Ves. 261,) and *Davies* v. *Clough*, (8 Sim. 262.) *Parratt* v. *Parratt*, 749.

COURT OF EXCHEQUER.

(*Executor — Renunciation of Probate — Retraction of Renunciation — Joinder of Parties to Actions.*) A formal renunciation, or refusal of probate, by an executor named in a will, is absolutely binding and conclusive upon him, unless he afterwards comes in and retracts it; and, therefore, where one of two executors, having in due form, in the proper ecclesiastical court, expressly renounced all right, title and interest to probate, and refused to act in any way in the execution of the will, his fellow obtained probate, and afterwards died; whereupon letters of administration *de bonis non*, with the will annexed, were granted to a third party, but the surviving executor, although still living, was not previously cited to prove or renounce probate, it was *held*, that the administrator *de bonis non* was the legal personal representative of the testator. The decision turned upon the construction of the statute 21 Hen. VIII. cap. 5, § 3. But this decision does not affect the doctrine that the renunciation of the executor shall be deemed void for the purposes of suit; so that, in an action by the executor who proved the will, the name of the renouncing executor must be joined as co-plaintiff. *Venables* v. *East India Company*, 855.

COURT OF QUEEN'S BENCH.

(*Agency.*) Plaintiff had supplied goods, by order of defendant, to a woman with whom he was cohabiting, at two different lodgings in succession; after they had separated, but before notice of separation had been given to plaintiff, plaintiff did work by her order at a third lodging, which she had taken: *Held*, that defendant was liable for the work done, not having revoked the authority which he had given the plaintiff to treat her as his agent. *Ryan* v. *Sams*, 745. By Ld. Denman, C. J. and Patterson, Coleridge and Earle, justices.

COURT OF COMMON PLEAS.

(*Factor — Authority to sell for repayment of advances made on consignment.*) A factor who has made advances to his principal on goods

consigned to him for sale, has no authority by law, independently of any agreement, to sell the goods at such prices and times, as in the exercise of a sound discretion he thinks best for his principal, in order to reimburse himself such advances, although the principal, when called on to repay the advances, makes default in doing so. The authority to a factor to sell, does not become, merely by the factor afterwards making advances upon the credit of the goods consigned, an authority coupled with an interest, but is an independent authority, and may be revoked. The making such advances may, however, be a good consideration for an agreement, that the authority to sell shall be no longer revocable. By Wilde, C. J. *Smart et al.* v. *Sanders et al.* 751.

(*Trespass for False Imprisonment — Evidence.*) A. preferred a charge of embezzlement against B. before a magistrate. The magistrate asked, "do you intend giving B. into custody for it?" A. replied, "I do give him into custody." Whereupon B., by the order of an officer of the court, went into the dock. *Held*, that there was no evidence of A.'s having done more than call upon the magistrate to exercise his jurisdiction; and that the consequent imprisonment was the act of the magistrate, for which trespass would not lie against A. *Brown* v. *Chapman*, 799.

Notices of New Books.

Appendix to Cases in the Circuit Court of the United States, for the Third Circuit; containing the Pea-Patch or Point Delaware Case. Reported by John William Wallace. Philadelphia: Walker, 24 Arch Street. 1849. pp. 171.

The above work, which we have received in sheets, is printed as an appendix or supplement to a series, hereafter to appear, of cases in the third circuit of the United States, although originally designed to be included in the same volume with them. The Appendix contains, in addition to the Pea-Patch case, but a single short case, that of Hurst *v.* Jones, which decides that *ex parte* affidavits made *ante litam motam*, are admissible as hearsay. The statement of the Pea-Patch case is as follows:

About the year 1783–4, there appeared at low tide in the Delaware river, about five miles below New Castle, a small muddy exposure of the soil, 'about the size,' as was testified, 'of a man's hat.' By the force of alluvion and deposit the exposure became larger and larger, until, by degrees, it formed an island of about eighty-seven acres, which in consequence of a tradition that a vessel laden with peas had once sunk on the spot where the island afterwards rose, got the name of the Pea-Patch

Island. In 1784 the Proprietaries of West Jersey granted this island, describing it as situate in Salem county, New Jersey, to persons whose title became afterwards vested in Dr. Henry Gale of that state; and in 1831, the same state, by an act of its legislature, relinquished to Dr. Gale whatever interest it might have in the island. It had previously declared that its western boundary, at this place, came to the middle of the main channel of the Delaware river, a location which, as the main channel was then supposed to run, included the Pea-Patch Island as within the territory of New Jersey. In 1813, the state of Delaware, by an act of its legislature, conveyed the island to the United States, who soon after took possession of it and began to erect a fortress upon it. In consequence of these two grants, a controversy as to the right to the island began between Dr. Gale, claiming under the title of New Jersey, and the United States claiming under that of Delaware. This dispute brought in question the boundary between the states of New Jersey and Delaware; and public attention was moreover directed to the matter from the accidental position of the island itself. Above it lie many principal towns or cities of the three states of Delaware, Pennsylvania and New Jersey, which could be readily devastated by an enemy's fleet unless the river was protected from below; while, from the width, the course, or the shifting character of the Delaware channel, there is scarcely any point either above or below, that offers a place where adequate defences could be erected for any of them. This island, however, constitutes the key of defence of the whole river. It stands just in the centre of its entrance, and commands its two channels, of which the deepest runs close along its side, and the other is so curved as to lie for a great distance directly and most favorably exposed to its guns. A fortress had been partially erected on the island by the United States during the war of 1812, but was destroyed by fire some years after. The towns along the Delaware River, whenever there was a rumor of danger of a rupture with either of the great naval powers, were constantly imploring congress to complete or rebuild the fortress upon this island; while at the same time the New Jersey claimants would appear with assertions of title to the island, fortified by written opinions from the law officers of the government itself, and by remonstrances from citizens of New Jersey against such an unlawful invasion of their territory as was contemplated by assuming possession of the island, except under grant of the individual proprietor. The contest had been diligently pursued for thirty-three years. It had occupied the attention of congress, and opinions, of directly opposite conclusion on the title, had been given by the best lawyers in the country. Two conflicting judgments in two different circuits of the United States had been obtained, and under them the harmonious operation of the federal courts was made the witness of a marshal of one district turning out of possession the tenants who had lately been put in by the marshal of another.

In this state of long protracted litigation and treaty, on the 8th of August, 1846, when the Oregon question had lately been giving to our relations with Great Britain a menacing aspect, congress passed an act authorizing the president of the United States 'to take such steps as he

may deem advisable for adjusting the title to the Pea-Patch Island.' In pursuance of this authority, communications were had between the president, in behalf of the United States, and the Hon. John H. Eaton, counsel of the New Jersey claimant, by which it was agreed to submit the question of the title to arbitration."

Hon. John Sargeant, of Philadelphia, was appointed sole arbitrator, with full power to settle the case; his decision and award made in writing to be final and conclusive. The hearing, which lasted twenty-one days, was had in public in Philadelphia. John M. Clayton and James A. Bayard, Esquires, of Delaware, appeared for the United States, and George M. Bibb, Esq., of Kentucky, and John H. Eaton, Esq., of Tennessee, for Dr. Humphreys, in whom Dr. Gale's title had become vested.

The case was elaborately and ably argued, and a vast amount of documentary evidence was put in on both sides, consisting of title deeds going back as far as the grant by Charles II. to the Duke of York, in 1633–4, and of numerous legislative enactments of New Jersey and Delaware. There was evidence also that New Jersey had exercised jurisdiction over the Delaware river, and that Delaware had had, for a long period, jurisdiction *de facto* over the Pea-Patch Island. On the 15th January, 1848, Mr. Sargeant made his award: "that the title to the Pea-Patch Island is in the United States."

The general appearance of the volume is highly creditable both to the reporter and the publishers. Copious side notes make reference to the subjects in evidence or under debate, easy. The statements are concise and clear, and no extraneous matter is admitted. From this specimen number, we anticipate much pleasure from the forthcoming volume, to which this case forms an Appendix.

THE LAW OF DEBTOR AND CREDITOR, IN THE UNITED STATES AND CANADA. By JAMES P. HOLCOMBE. New York: D. Appleton & Co. Boston: Otis, Broaders & Co.

The only limitation upon the form of state governments, is, that they shall be republican; the only limitation upon state legislation, is, that it shall not conflict with the constitution or the laws of the general government. Hence, nearly all the laws regulating property, real and personal, its modes of acquisition and transfer, its descent and distribution, are within state jurisdiction. And as the states were originally settled by emigrants from different nations, bringing with them different habits and customs, and affected by various circumstances of soil, climate and pursuits, there is great diversity in the laws regulating property and its incidents. Especially is this true in respect to laws regulating the relations of debtor and creditor, their rights and obligations, and the remedies afforded to creditors against debtors who refuse to perform their obligations. These laws, under the appropriate title which we have placed at the head of this notice, are the subject of Mr. Holcombe's book.

Such are now the facilities of intercourse between the different states, that there is hardly any person engaged in the active business of life who does not

hold the interesting relation of debtor or creditor to citizens of other states than his own. It therefore frequently becomes necessary for business men to ascertain what course they can pursue to recover debts due from persons in other states, whose failure or negligence compels a resort to the laws of the place of the debtor's residence. For all such persons the book will be found a most useful and convenient manual. "Remedies to collect debts," "Proceedings in civil suits," "Attachments," "Assignments by insolvent debtors," and "Effect of death upon the rights of creditors," are some of the titles into which the work is subdivided. These and kindred subjects are treated of separately, as they exist in each of the several states, the District of Columbia and the Canadas. The design and execution of the work is such as to commend it to all who have occasion to examine the subject of which it treats, especially to merchants and lawyers, to whose wants it is more particularly adapted.

COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW AND STATUTORY AND CONSTITUTIONAL CONSTRUCTION, containing an Examination of Adjudged Cases on Constitutional Law, under the Constitution of the United States, and the Constitution of the respective States concerning Legislative Power; and also the Consideration of the Rules of Law in the Construction of Statutes and Constitutional Provisions. By E. FITCH SMITH, Counsellor at Law. One vol. pp. 976. Albany: published by Gould, Banks & Gould, Law Booksellers, 104, State street; and by Banks, Gould & Co. 144, Nassau street, New York. 1848.

In addition to the subjects mentioned in the above extended title, there are chapters upon the origin and history of legislation among the ancient governments in England, and in the colonies of Virginia, New Plymouth, Massachusetts Bay and Connecticut; upon the legislative powers of the states and the bills of rights of the respective states, and upon legislative authority irrespective of constitutional restrictions. These restrictions are arranged in three classes; the first, including those contained in the federal constitution, and applicable to the federal government; the second, those in the federal constitution, applicable to the state legislatures; and the third, those in the constitutions of the respective states, and applicable only to the legislature of the particular state. This third subdivision, being new, is discussed more at length than the other branches of constitutional law. The learned author is, we believe, the first in this country to throw into the form of a text book the decisions upon the construction and interpretation of statutes; and in this he has done good service. If there were a table of the cases cited, it would be of great assistance in referring to the points adjudicated upon. We hope this omission will be supplied when the work reaches a second edition.

The work contains much valuable matter. The author is a strict constructionist of the constitution, and also conscientiously opposed to "the progress of the political pestilence of excessive and unconstitutional legislation."

REPORTS OF CASES ADJUDGED IN THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW YORK. From January Term, 1799, to January Term, 1803, both inclusive; together with Cases determined in the Court for the Correction of Errors, during that period. By WILLIAM JOHNSON, Counsellor at Law. Second edition, with many Additional Cases, not included in the former edition, from the original Notes of the late Hon. Jacob Radcliff, one of the Judges of the Supreme Court during the time of these Reports, with copious Notes and References to the American and English Decisions. By Lorenzo B. Shepard, Counsellor at Law. Vol. II., pp. 595; containing the Cases from October Term, 1800, to October Term, 1801, inclusive. New York: Published by Banks, Gould & Co., Law Booksellers, No. 144, Nassau Street; and by Gould, Banks & Gould, No. 104, State Street, Albany. 1848.

This is a valuable reprint. The fact that these cases contain the opinions of Chancellor Kent, then a Judge, is sufficient to give a permanent value to the work. The additions by the editor appear to be well done.

THE LAW OF INFANCY AND COVERTURE. By PEREGRINE BINGHAM, of the Middle Temple. Second American, from the last London edition. With Notes and References to English and American Cases, by E. H. Bennett. Burlington: Chauncey Goodrich. 1849.

So far as the work of Mr. Bingham is concerned, it is so generally known to the profession in this country, as to require little to be said. It is, perhaps, one of the best works upon the subjects there discussed, yet still far from what is desirable upon so important departments of the law of the domestic relations as are infancy and coverture. The author announces, in his advertisement, that the entire subject of the conveyance of land by deeds of lease and release, and whether such an act by an infant is *void*, or only *voidable*, is wholly omitted, out of deference to the opinion expressed by Mr. Preston in his late Treatise on Conveyancing, vol. 2, page 248, wherein he questions the soundness of the leading case of Zouch *v.* Parsons, 3 Barrow, 1794. But this case has certainly been followed in the American courts to a very great extent. Bost *v.* Mix, 17 Wendell, 119. But as a text book for learners, and a manual for the practising lawyer, the work of Mr. Bingham is, perhaps, as good as any.

The editor, Mr. Bennett, who is, we believe, a son of Mr. Justice Bennett, of the Vermont supreme court, and now a resident in Massachusetts, has performed his part of the work with creditable care and ability. Mr. Bennett has here presented the profession with extended notes, upon all the more important subjects discussed in the principal work, with a systematic arrangement and thorough exhaustion of everything important to be known in regard to those matters, which compares advantageously with the best Boston or New York editions of English elementary law books; and with very extended references to the American cases, and most of the late English cases. We think the present edition a very considerable addition to the facilities before at hand, in regard to the subjects there

treated. The mechanical execution of the work is certainly very creditable to the publisher, although inferior, as we think, to the professional ability with which the work is edited.

A Treatise on the Law on Evidence. By Simon Greenleaf, LL.D. Emeritus Professor of Law in Harvard University. Vol. I. Fourth Edition. pp. 743. Boston: Charles C. Little & James Brown. London: Stevens & Norton, 194 Fleet Street. 1848.

Our exalted opinion of this Treatise upon Evidence has been too frequently expressed upon the appearance of the several editions, to need repetition here. The extended and increasing sale of the work among a cautious and discerning profession is its best praise. This new edition is not a mere reprint of the former editions, but the work has been again carefully revised and corrected, and all the decisions in England, Ireland and America, published since the last edition, and which seem to affect the text, have been referred to, and new matter has been added which will increase its usefulness to the student and to the profession.

A Digest of the Laws respecting Wills, Executors and Administrators, Jurisdiction and Practice of the Courts of Probate and Equity, in relation to the Estates of Decedents. Also, the Law of Descent, Distribution, Dower, and Guardian and Ward, including the Statutes and Decisions of the High Court of Errors and Appeals of the State of Mississippi, and the Judicial Decisions of other States of the Union on the same subject. By. John M. Chilton. Vicksburg: Printed by M. Shannon, for the Author. 1846. One Volume. pp. 528.

Miscellaneous Intelligence.

Pattee v. Greeley. — In the November number of the Reporter we published some comments upon this case from a western correspondent. We give below some remarks upon it from a source nearer home; merely restating that the decision was, that a bond made on Sunday and not being a work of necessity or charity, is void under Rev. St. ch. 50, § 1.

The question for consideration is, "Did the legislature intend to prohibit such kinds of business as the executing of bonds on the Sabbath?" For if they did, the conclusion logically follows, that such instruments are void. The execution of an instrument in legal intendment, is something more than the mere manual act of signature and delivery. It may fairly include the negotiation of the contract, the settlement of the

details, and the final mutual assent to all the terms; or, if not necessarily implying all this as actually taking place at the time of the execution of the instrument, the law refers all these to that time, and there actually does take place a mental apprehension of the terms and conditions of the contract, and a mutual legal assent thereto. The statute prohibits "any manner of labor, business or work, except only works of necessity or charity." If the execution of a bond be not included in the terms "any manner of business" it would be difficult for the legislature to use any general term sufficiently unambiguous to cover such an act. If the defendant had been asked what his *business* was in the plaintiff's house that Sunday, and had answered, "I went there to execute a bond," it would have been a straightforward reply to a plain question. The preamble and the history of a law are good guides in its construction. This section of the statute is a reënactment, very nearly *verbatim*, of the first section of the act of 1791, ch. 58, the preamble of which is as follows: "Whereas the observance of the Lord's day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labor and the cares of business; for moral reflections and conversation on the duties of life and the frequent errors of human conduct; for public and private worship of the Maker, Governor, and Judge of the world; and for those acts of charity which support and adorn a christian society: And whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's day, profane the same by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage as members of a christian society; to the great disturbance of well disposed persons, and to the great damage of the community, by producing dissipation of manners and immoralities of life." Preambles are now out of fashion; but the legislature, in 1836, having reenacted the statute of 1791, ch. 58, are to be understood as having the same objects in view as were attempted to be secured by the former act. The English statute of 29 Charles II. ch. 7, (still in force,) differs from ours. "No tradesman, artificer, workman, laborer, or other person, shall do or exercise any worldly labor, business or work of their *ordinary* callings on Sundays, works of necessity or charity, only excepted." As the words describing the acts forbidden are the same the cases in England apply to the construction of our statute where the "labor, business, or work" is within the "*ordinary calling*" of the party. *Fennell* v. *Ridler*, (8 Dowl. & Ry. 204,) was an action on the warranty of a horse sold by the defendant to the plaintiff on Sunday. The bargain was made "in the defendant's yard, the gates of which were shut," and not exposed to public observation. It was argued that this was not within the statute, the object of which was to preserve *public* decency, and the *public* observance of the Sabbath; but Bayley, J., in giving the opinion of the court, says that both the spirit and terms of the statute are applicable to such a case. He corrects a dictum of his own in the case of *Bloxome* v. *Williams*, (5 Dowl. & Ry. 82,) that the object of the statute was to prevent handicraftsmen and laborers from exercising their ordinary employments in a way offensive to the eye. "On mature consideration" he

considers "that such a construction would be too narrow, and contrary to its spirit. Labor may be private, and not meet the public eye, and so not offend against public decency, but still it would be within the statute prohibition. And so of 'business' and 'work.'" The contract was held void. *Smith* v. *Sparrow*, (4 Bingh. 84,) was an action on a contract for the purchase of goods, entered into by the agent of the plaintiff, on Sunday. The contract was held void, and Best, C. J. refers to the decision of Bayley, J. in *Fennell* v. *Ridler*, as "one of the most able judgments ever delivered." *Drury* v. *Defontaine*, (1 Taunt. 131,) is a very deliberately considered opinion of Lord Mansfield to the same point. American cases out of Massachusetts, are very numerous. We shall refer to only a few in different states. In New Hampshire the statute is like the English one, except the substitution of the word "*secular*" for "*ordinary;*" and in *Clough* v. *Davis*, (9 New Hamp.) it was held "that in that state all secular contracts made on the Sabbath are void."

Can there be any doubt that the making and receiving the bond in question was an illegal act, and that the court would sustain an indictment and a verdict of guilty against both the parties, on this state of facts? If, then, the act be *criminally* unlawful, as between the commonwealth and the parties, it is *civilly* unlawful, as between the parties themselves; and both parties being *in pari delicto*, the court would not sustain an action founded on such a contract.

The Vermont statute is like that of New Hampshire. *Lyon* v. *Strong*, (6 Verm. 219,) contains a very full examination of the authorities, and an elaborate discussion of the principle. A horse was sold, with a warranty of soundness, and the warranty was held void, as made on the Sabbath. *Adams* v. *Gay*, (19 Verm. 358, decided in 1847,) was an action on a warranty in a contract made on Sunday, in New Hampshire. It was sustained on the ground that the New Hampshire law was not proved, and, besides, that there was a subsequent affirmance of the contract. The court confirm the principle laid down in *Lyon* v. *Strong;* but they held that a contract made on Sunday, and affirmed on a subsequent day, is good; and if property has passed to one, in pursuance of a contract made on Sunday, its return may be demanded; or, where that is impracticable, compensation must be made, and, if this be done in reasonable time, and the other party refuse, the original contract thereby becomes affirmed. This construction effectually prevents persons taking advantage of their own violation of law to protect their fraud.

The New York Statute is very different. It simply prohibits "servile labor and working," and "exposing goods to sale." Under this statute, a *private* sale of goods has been held valid, but the same principle was recognized as in the cases just cited. The Connecticut Statute is substantially like that of New Hampshire. In *Fox* v. *Abel*, (2 Conn. 560,) it is stated by the court, that the execution of a written instrument on Sunday has always been held void in that state.

The Pennsylvania Statute is nearly the same as that of Massachusetts. "If any person shall do or perform any worldly employment or business on the Lord's day, works of necessity and charity only excepted, &c."

The case of *Kefner* v. *Keefer*, (6 Watts, 231,) was in its facts similar to *Pattee* v. *Greeley*. A note was written and delivered on Sunday, but dated Saturday, the details of the bargain having been arranged on Saturday, and nothing said about the terms on Sunday. It was held void. *Burrill* v. *Smith*, (2 Miles, Pa. R. 402,) was an action to recover the hire of horses on a contract made on Sunday; and it was held that such a contract was void where the hiring was for worldly business or for pleasure; and that a contract made on Saturday for the hire of horses on Sunday for such purposes, would be void also. In *Fox* v. *Mench*, (3 Watts & Serg. 402,) a bond executed on Sunday was held void.[1]

In Massachusetts, the general principle upon which the decision of *Pattee* v. *Greeley* is founded, has been repeatedly recognized, viz. that an action cannot be sustained upon a contract made in contravention of law. But there seems to have been a general understanding in the profession, that the courts in this state have refused to apply this principle to contracts made in violation of the Lord's day act. It is remarkable, that in Massachusetts alone there should be any doubt on this point, — in Massachusetts, where it was once proposed, in the colonial assembly, to punish "the crime of disregarding or carelessly observing the Sabbath, with death!" *Pearce* v. *Atwood*, (13 Mass. R. 324, 346.)

The series of decisions on this subject in this state commenced with a professional blunder. The earliest case in the Reports is *Geer* v. *Putnam*, (10 Mass. R. 312 [1813].) It was an action on a promissory note, to which the defendant pleaded, that "the note declared on was made on the Lord's day;" but without negativing that the making of it was a work of "necessity or charity, and without alleging that it was made before sunset, the statute prohibition extending only "to the time included between the midnight preceding and the sun-setting of the same day." The term, Lord's day, as used in our statutes, very clearly includes twenty-four hours, but the prohibition extends to only a portion of the day, for the reason given in the statute, that there was a difference of opinion as to the keeping of Saturday or Sunday evening as holy time. There is no pretence, therefore, that the term Lord's day, used in the plea, was restricted or intended to be restricted to that portion of the day to which the prohibition was confined; and if it were, the plea was bad in not negativing the assumption that the case was within the other exceptions. On demurrer, the plea was overruled and the plaintiff had judgment. The defendant's counsel apologized for setting up the defence, and abandoned the point, and the chief justice recollected a similar case,

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[1] In a very late case, (*Specht* v. *The Commonwealth*, 1848,) the supreme court of Pennsylvania, after a very full argument, have decided in favor of the constitutionality of the Lord's day act. The constitution of Pennsylvania provides that "no preference shall ever be given by law to any religious establishments or modes of worship." The plaintiff was a "Seventh day Baptist," and was fined by the local court for following the ordinary labors of his farm on Sunday, and appealed to the supreme court on the ground of the unconstitutionality of the statute prohibiting "any worldly employment or business whatsoever on the Lord's day." — *Democratic Review, Nov.* 1848.

decided in Plymouth county, which is not reported, and of the facts and pleadings of which we know nothing. If the counsel had apologized for his bad pleading, and been as careful of the legal rights of his client as he was anxious to avoid any suspicion of a leaning towards puritan strictness, our courts might have been saved the inconvenient inheritance of a wrong decision, and his client had less ground to complain of the uncertainty of the law. He lost a case in Connecticut, where this defence was set up; and he lost the same defence set up by himself in Massachusetts; and both decisions were given by common law courts deciding upon the construction of similar statutes.

The report of the case is very brief, not occupying more than half a page; and it may be said, that for aught which appears in so summary a statement, the plea did negative the circumstances that would bring it within the exceptions of the statute. But, as matter of fact, the records of the court show that the plea was just as defective as the report indicates, and this we learn was so understood at the hearing of *Pattee* v. *Greeley*. So that all that this case decides is, that an insufficient plea of this statute is no defence to an action on a contract. But the case is entitled to very little consideration, whatever it may purport to decide. The plaintiff had no counsel in the supreme court. The defendant's counsel presented his case and surrendered it, and there was a *per curiam* decision in some ten words. No cases were cited, and no reference was made to the statute. But this little case has been cited everywhere, in opposition to the numerous English and American decisions. In Alabama, where the statute on this subject is very like ours, counsel who wished to sustain the validity of such a contract, cited *Comyns* v. *Boyer*, a decision in the time of Elizabeth, on the validity of such a contract at common law in the absence of any statute, and *Geer* v. *Putnam*. The court, however, held the contract void.

The next case was *Clapp* v. *Smith*, (16 Pick. 247) in 1834. A debtor made an assignment, under the old assignment law, to one of his creditors in trust for all. This assignment was executed on Saturday, and the goods were delivered the same day in pursuance of it. In the instrument reference was made to a "schedule thereto annexed." This schedule was annexed "in the course of the next day;" what part of the day, whether before or after sunset, the exceptions do not find. The court held, that if the assignment was not good as a bill of sale, it would be good as a declaration of trust, and that it was competent to prove by parol testimony that the goods were delivered the same day under the trust thus created, and that this constituted a legal transfer of the goods to the plaintiff. This decided the case; the question being the plaintiff's title to the goods. But the court proceed to say; "But if the annexation of the schedule of the property were necessary to complete the sale, we are of opinion that it was not a void act, because done on Sunday. The case of *Geer* v. *Putnam*, (10 Mass. R. 312.) is decisive on this point; and we think there is no sufficient reason for overruling that case. That case was decided in 1813, and Chief Justice Parsons says, that the same principle had been laid down in a former case; and the law has ever since

been considered and recognized as the law of this commonwealth. The legislature has since revised and altered some of the provisions of the act of 1791, ch. 58, and the subject of the due observance of the Lord's day has been much discussed, but no alteration has been made in the law as laid down in the case of *Geer* v. *Putnam*. Under these circumstances, we feel bound to abide by the rule *stare decisis*." We are not disposed to quarrel with the maxim, that the people are presumed to be present, and take cognizance of all the decisions of our courts, and by silence are held to have acquiesced in them; but they must be presumed to understand the exact legal effect of the decision upon the case presented. Now the exact legal effect of the decision upon the case presented in *Geer* v. *Putnam*, was, that a very bad plea of a very good statute is a very poor defence to an action, and the people had no occasion to choose representatives to pass a statute to control this decision.

Thus we see, that these two cases may stand as right decisions on the facts presented consistently with the law as laid down in *Pattee* v. *Greeley*. All that was said against the principle of the last case were dicta, strong, we admit, but not to weigh against the reason of the thing and the current of English and American decisions directly upon the point. Even admitting the full force of these two opinions, (for they cannot properly be called decisions, not being upon matters necessary to the disposal of the cases,) yet the weight of authority generally is very clearly against them; and on principle it seems to us, that while the law stands on our statute-book, prohibiting such acts, our courts can come to no other decision as to the legal effect of these acts.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Master or Judge.
Bates, Isaac C.	Boston,	Nov. 14,	J. M Williams.
Brastow, Oliver S.	Wrentham,	Oct. 13,	Francis Hilliard.
Child, William C.	Boston,	" 31,	J. M. Williams.
Cotton, Isaac,	Boston,	Nov. 9,	J. M. Williams.
Crafts, R. A. et al.	Boston,	" 14,	J. M. Williams.
Cutter, Albert,	Walpole,	Oct. 20,	Francis Hilliard.
Drew, Sylvanus,	Duxbury,	" 11,	Welcome Young.
Ellis, Daniel H.	Foxborough,	" 23,	Francis Hilliard.
Felt, William D.	Lynn,	" 31,	John G. King.
Gates, Daniel,	Ware,	" 27,	Myron Lawrence.
Goodwin, George C.	Boston,	Nov. 18,	J. M. Williams.
Holbrook, Charles A.	Grafton,	Oct. 27,	Henry Chapin.
Howard, Linus,	Norton,	" 7,	David Perkins.
Jones, Frederick H.	Boston,	Nov. 11,	J. M. Williams.
Jordan, Thomas,	Weymouth,	Oct. 17,	Francis Hilliard.
Joslin, John E.	Lancaster,	" 23,	Henry Chapin.
Kelley, Sidney,	New Bedford,	" 5,	David Perkins.
Knights, Henry G.	Boston,	Nov. 20,	J. M. Williams.
Leland, Hastings,	Newton,	" 6,	Asa F. Lawrence.
Porter, Tyler,	Hamilton,	Oct. 1,	John G. King.
Rodgers, Aaron D.	Springfield,	" 18,	George B. Morris.
Shepard, Calvin,	Ashland,	Nov. 23,	Asa F. Lawrence.
Simons, George,	Worcester,	" 10,	Henry Chapin.
Symonds, James M.	Springfield,	" 5,	George B. Morris.
Wadleigh, Isaiah,	Boston,	Nov. 6,	J. M. Williams.
Willard, Silas J.	Ashburnham,	Oct. 11,	Henry Chapin.
Willard, William D.	Newton,	Nov. 6,	Asa F. Lawrence.
Woodruff, William B.	Springfield,	Oct. 26,	George B. Morris.